Filed 10/25/12 Park Wellington Owners Assn. v. Edwards CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

PARK WELLINGTON OWNERS' ASSOCIATION et al., Plaintiffs and Appellants, v. WILLIAM T. EDWARDS et al., Defendants and Respondents.	B235623 (Los Angeles County Super. Ct. No. BC455632)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed in part, reversed in part, and remanded.

K&L Gates, Cyrus Naim and Ronald W. Stevens for Plaintiffs and Appellants.

Law Offices of Roderick J. Lindblom, Roderick J. Lindblom and Caroline G. Rath for Defendants and Respondents.

This appeal stems from defamation claims brought by the Park Wellington Owners' Association (PWOA or Association) and three members of its Board of Directors, Sue Banas, Melissa Kent, and Jenny Worman (collectively appellants), against one of the homeowners, William T. Edwards, his tenant and employee, Lolly Howe (collectively respondents), and numerous Does. The superior court granted respondents' special motions to strike under Code of Civil Procedure section 425.16 and awarded costs and attorney fees.[1]

"An anti-SLAPP-suit motion is not a vehicle for testing the strength of a plaintiff's case, or the ability of a plaintiff, so early in the proceedings, to produce evidence supporting each theory of damages asserted in connection with the plaintiff's claims. It is a vehicle for determining whether a plaintiff, through a showing of minimal merit, has stated and substantiated a legally sufficient claim. [Citations.]" (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 906 (*Wilbanks*).) We conclude that appellants have made a sufficient showing of a legally sufficient claim as to Edwards and so reverse the order granting Edwards' motion. However, as to Howe, we conclude that appellants have not made a sufficient showing and so affirm the order granting her motion. On remand, the trial court is to reevaluate the award of costs and attorney fees and determine the portion attributable to work performed on behalf of Howe.

FACTUAL AND PROCEDURAL BACKGROUND

PWOA is the homeowners' association for a residential community of 163 condominium units in Los Angeles, known as Park Wellington. The PWOA is

---

[1] Such a motion is "commonly known as an anti-SLAPP (strategic lawsuit against public participation) motion." (*Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 280.) All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

governed by bylaws and a Declaration of Covenants, Conditions and Restrictions (CC&Rs). Every condominium owner is a member of the PWOA, which is governed by a five-person Board of Directors. In the time period relevant here, Banas was Treasurer, Kent was President, and Worman was Secretary of the Board of Directors. Worman was elected to the Board in January 2008. Kent was appointed to the Board on May 11, 2007, by then-President Shanel Stasz, and Kent was elected President in January 2008. Banas was elected to the Board in March 2008 by the other Board members.

Edwards is the owner of a unit at Park Wellington. He served on the Board from 1988 to 1994. Howe and her 14-year-old son are tenants in Edwards' unit, and Howe works as the office manager for Edwards' business. Edwards is not computer literate, so Howe types his correspondence, email, and comments for the "Park Wellington Grievance Line" blog, which is the source of most of the allegedly defamatory statements at issue. Edwards stated in his declaration that he did not create the blog, and that he instructed Howe to sign his comments on the blog with his full name. Howe did not edit Edwards' statements or comments on the blog.

The statements at issue in this case arose from several different incidents concerning Park Wellington. We describe the background of each incident below.

I. *Lawsuit against Shanel Stasz*

Unit 129 at Park Wellington, which was originally used as housing for the on-site manager, was rented by PWOA to tenants until September 1, 2007. In September 2007, Stasz told Kent that she planned to move into Unit 129 as compensation for serving as the Association's legal consultant. Stasz was the acting President of the Board at the time. According to Kent's declaration, Stasz

unilaterally decided that the Board would give her the unit as payment for being a legal consultant to the PWOA, even though the PWOA bylaws prevented Board members from being compensated for their service. Kent knew that Stasz was in bankruptcy proceedings, so she asked Stasz about it, and Stasz told her she would have no place to live in October as a result of her bankruptcy.

Kent thought that Stasz's plan to take Unit 129 was not legal or authorized, so she spoke with another Board member, Mr. Meimandi, about it. Mr. Meimandi told her he did not want to get involved and thereafter refused to speak with her or return her calls. Kent began to feel ostracized by Stasz, Meimandi, and the on-site property manager, Gregg Landis. On September 16, 2007, Kent received a letter "purporting to be from the Association," stating that she was removed from the Board.

While Kent was on the Board, she learned of other problematic financial and administrative practices under Stasz's leadership, such as questionable charges on PWOA's credit card and payment of the credit card charges from PWOA's reserve account. For example, she learned that Stasz had charged more than $120,000 in Landis' personal living expenses on the Association credit card and used funds from the Association's reserve account to pay the charges. She also learned that Stasz had "relieved herself of the obligation to pay thousands of dollars of monthly PWOA dues." In addition, Ross Morgan & Company, PWOA's property management company which was responsible for the Association's financial and administrative management, was prevented from acting as the independent election examiner and from obtaining copies of the credit card statements.

Because Kent was concerned about PWOA's finances, she hired the law firm of K&L Gates to represent the Association. In her capacity as a Board member and as Vice President of the Board, on October 15, 2007, Kent filed a

complaint to remove Stasz from the Board, to prevent her from obtaining title to Unit 129, to prevent her from destroying PWOA records, for misappropriating funds, and for an accounting and restitution.

During the lawsuit, "a number of PWOA owners/members signed a petition to hold a recall election for the purpose of recalling Stasz as a director and officer of the PWOA." Edwards did not sign the petition. When the Association members were informed of the lawsuit, Edwards stated that he favored paying Stasz at least $10,000 to induce her to enter into an agreement to resign her positions.

In August 2009, judgment was entered against Stasz and in favor of the Association for $103,068.74 plus costs, and a preliminary injunction was issued, preventing Stasz from serving on the Board and ordering the election of a new Board. The superior court found that Stasz had used the Association's credit card for her personal living expenses, in the amount of $89,325.00, and paid for the charges out of the Association's reserve account. The court further found that Stasz was not entitled to be on the Board of Directors or to serve as President of the Board because she was not the owner of a condominium in Park Wellington. The court also found that Stasz had arranged to have six checks issued, totaling $13,473.74, from the Association's operating account to pay charges on a credit card issued to Landis, but the charges were not related to Association business. The court concluded that Stasz had committed conversion and breached a fiduciary duty to the Association by arranging the issuance of the credit card and diverting reserve account funds for her personal gain.

Kent stated that she initiated the action against Stasz for the benefit of the Association and all its members in order to remove a director/president who had misappropriated over $100,000 of Association funds from the reserve account.

She also stated that she brought the suit under provisions of the CC&Rs and California law, which entitle an owner who successfully enforces the CC&Rs and Bylaws to payment of legal fees.

Kent recused herself from the Board's discussion and vote regarding the payment of the legal fees from the Stasz litigation. The other directors on the Board, advised by an independent attorney, determined that the legal expenses were reasonable and were incurred on behalf of and for the benefit of the PWOA and all its owners/members; therefore, the Board adopted a resolution approving payment of the legal expenses. The legal expenses were paid from the Association's operating funds, not the reserve account.

In October 2009, Stasz filed suit against the Association and Board, claiming an unlawful conspiracy for refusing to pay her legal defense costs and seeking $2 million in damages. Stasz alleged that the directors and officers of the Board caused the Association to pay $160,000 from the reserve account to the law firm that prosecuted the suit against her. The trial court found that Stasz's suit for indemnification was barred by the fact that the judgment against her was based on breach of fiduciary duty and conversion of Association funds and so dismissed the suit. Stasz's case was on appeal at the time appellants filed the complaint in the instant case.[2]

II. *Eviction of the Stanzlers*

In December 2009, Jeffrey Stanzler and his wife, Annouchka Yameogo, who were renting Unit 129 from PWOA, had an altercation with a PWOA owner and her guest, which resulted in the Stanzlers being evicted. The details are as follows.

---

[2] The judgment was affirmed on appeal. (*Park Wellington Owners' Ass'n v. Stasz* (B220411, June 21, 2011) 2011 Cal.App.Unpub.Lexis 4623.)

On December 13, 2009, around 3:30 a.m., Stanzler and Yameogo were awakened by the sound of women's voices at the valet drop-off in front of the building.

According to Stanzler, the women were drunk and talking loudly outside his window, so he and his wife politely asked them to be quiet. The guest began pointing her finger at Yameogo and insulting her, so Yameogo slapped her on the clavicle. The woman then scratched Stanzler.

According to the police report, the women were getting out of a car when Stanzler and Yameogo yelled at them to shut up. Stanzler and Yameogo began throwing water bottles out their window at the women. As the women approached the entrance to the building, Stanzler and Yameogo met them at the front door and started a verbal confrontation. Yameogo struck the woman twice in the face, and Stanzler took her cell phone from her. The women went inside and called the police. Stanzler told the police that, when the woman tried to get her cell phone back from him, she scratched his left pinky finger. PWOA investigated the incident and watched a security videotape, which showed Stanzler and Yameogo "physically assaulting and battering a guest of a PWOA owner/member without justification."

The Board decided to evict Stanzler and Yameogo, and, on December 18, 2009, served them with a three-day notice to quit the premises. In spite of the three-day notice, the family was told that they had 30 days, until at least January 22, 2010, to move out. They moved out on December 24, 2009.

III. *Edwards' December 2009 Request for Membership List & February 2010 Letter*

In December 2009, Edwards asked for a list of PWOA members and addresses. Under Civil Code section 1365.2, subdivision (a)(1)(I)(ii), a member requesting a membership list must state the purpose for which the list is requested,

and the purpose must be "reasonably related to the requester's interest as a member. If the association reasonably believes that the information in the list will be used for another purpose, it may deny the member access to the list." Edwards initially refused to state the purpose for his request, but then said that he wanted to send out Christmas cards. Edwards then said he wanted to let the members know the Board was "creating a legal liability for the entire building," and he wanted to hold a new election. The Board provided him with the list.

Edwards used the membership list to send a letter dated February 18, 2010, raising several complaints, and forwarding a letter written by Stanzler to Park Wellington residents.

Stanzler wrote that he wanted to clear his name and discover if "anyone else had been mistreated by the Board and Management." He stated that he and his wife and 18-month-old daughter were awakened at 3:30 a.m. by "people loudly carrying on 10 feet below our first floor window." When they made a "respectful request for quiet," they were laughed at. Stanzler said that he went downstairs and demanded that the building's guard do something, but he refused. His wife then "went downstairs with our baby in her arms, with the idea that when the guest saw the issue at hand they would cease and go elsewhere. However, even this brought no level of civility, leading to an altercation between [her] and the female guest, and then Jeff and the female guest. Police were called and MUTUAL citizen's arrests were made for battery. (Subsequently the District Attorney's Office rejected all the charges). [¶] However, our unimaginable nightmare did not end there. Late into the Christmas week, without even a proper examination of all that occurred, the Park Wellington Building manager . . . served us with A THREE-DAY EVICTION NOTICE." Stanzler further wrote that they "were nothing short of model residents during all our time at the Park Wellington. In addition, there

was no inquiry, or examination conducted by the Board of Directors or the Management Company as to the facts and circumstances which occurred on the evening of December 13th." He stated that they were unable to find movers who would work on the holiday, so they were forced to move themselves, "a task that took until 2 a.m., Christmas morning." Stanzler then complained that their daughter was "robbed of having her second Christmas in her home," and that "the upheaval, moving costs, and unending attacks from the building (they've even refused to return our full security deposit) has caused us to cancel a celebration for our tenth wedding anniversary." Stanzler never mentioned in his letter that he and his wife threw water bottles at the women, that his wife struck one of the women, or that he took her cell phone.

Edwards wrote the following in his February 18, 2010 letter: "In the past few years I have been appalled by the treatment that many of us have been subjected to from the board, coupled with the fact that there is no avenue for other homeowners and residents to air their complaints. Our rules and regulations arbitrarily change without any homeowner input or vote. Actions are taken which leave us vulnerable to litigation and our reserves depleted for legal fees. [¶] One incredibly shocking example of this can be read in the enclosed letter. Please read and respond with both your own thoughts and any other individual complaints and/or comments you may have regarding our board to: http://pwgrievance.blogspot.com/."

IV. *Edwards' Letter to Kent's Father*

On March 7, 2010, Edwards wrote a letter to Kent's father, Mr. Richard Kent. In the letter, Edwards criticized the $160,000 legal bill paid by PWOA, stating "to what end – to eliminate Shanel Stasz, a woman in bankruptcy who had

been served with a thirty day eviction notice? If we had done nothing, the result would have been the same. By now, an estimate of our legal expenses since Melissa took over is $500,000, and I fear there is no end in sight. [¶] Currently, there is an on-going criminal investigation for embezzlement of funds from our Association's reserve account in order to pay Melissa's initial $160,000 legal bill to Ron Stevens. I don't know exactly what happened, but if the investigators find Melissa's signature on the bank withdrawal slip, things could get very serious for her. The fact that she was romantically involved with Mr. Stevens at the time only complicates matters more. [¶] . . . [¶] Please don't take offense, but you have created this mess by naming Melissa as a beneficiary in the trust that owns unit #310 in Park Wellington. [¶] If you remove her from the ownership trust, we can have new competent Board Members and work to extricate Park Wellington from the clutches of these attorneys, and stop the bleeding." Edwards went on to write that he had nothing personal against Kent and asked Kent's father to remove Kent from the trust that owned the unit. If Kent's father did not do so by March 18, Edwards would "proceed to seek relief from the courts and incur more headaches and legal fees."

V. *May 2010 Reserve Study Update*

Edwards made a series of statements on the blog and in a July 12, 2010 letter to Park Wellington residents regarding the Association's reserve account and a report about the reserve account, accusing the Board of having mismanaged the reserve account.

VI. *Edwards' Document Request and Small Claims Suit*

On May 4, 2010, Edwards wrote a letter to Jeanne McDonald, PWOA's counsel, to request inspection of PWOA's financial records. McDonald responded on May 14, 2010, and told Edwards that the documents were ready for inspection and copying, redacted to protect confidential and attorney/client privileged material. McDonald told Edwards that he was not entitled to see a breakdown of employee salaries. She explained that the management company would charge him $200 for the administrative expenses of making the documents available. (See Civ. Code, § 1365.2, subd. (c)(5).) She further explained that, because Park Wellington was in litigation with Stasz, Stasz was not to be allowed access to the records except as provided by law as part of the litigation. McDonald thus asked Edwards to agree not to make the records available to anyone who was not a current Park Wellington homeowner, other than his designee for the inspection. She also asked him to agree to maintain the confidentiality of the documents by not posting copies on the internet, not distributing copies to anyone not a member of PWOA, and by requiring his designee to comply with these terms.

On May 19, 2010, McDonald wrote a follow-up letter, stating that, under California law, owners are entitled to have only one designated representative conduct the inspection, so Edwards needed to choose between the two people he had designated, Lolly Howe and Pattidean Wohlford. McDonald noted that, although Edwards had described Wohlford as a forensic accountant, she was not licensed in California as a certified public accountant.

In a letter dated May 20, 2010, Edwards stated that he agreed to pay a "reasonable fee," but he did not think $200 was reasonable. He also stated that he was entitled to review amounts of compensation by job title, pursuant to Civil Code section 1365.2. He said that his representatives were available on May 27,

2010 for the review. On May 24, 2010, Edwards wrote another letter, stating that California law provided for the inspection to take place at the PWOA office, so he expected the records to be made available there.

McDonald told Edwards that his certified letter was not delivered to her office until late on May 26, and she did not receive it until after Wohlford called her on May 27. McDonald therefore did not know that Wohlford was coming and stated that less than 24 hours was not enough notice to make the documents available at the Park Wellington, especially since the documents were at the management company's office. She also pointed out that there was a copy machine at the management company's office, but not at the PWOA office and stated that she had offered the use of the management company's copy machine to Wohlford over the phone, but she declined the offer. McDonald therefore gave Edwards two options to obtain the requested documents. First, Wohlford could inspect them at PWOA's office on the date Wohlford and McDonald had agreed upon, June 3, 2010, and tab the pages she wanted copied, which PWOA would do at a cost of $0.16 per page, in addition to the $200 administrative charge. Wohlford would not be permitted to scan the documents. Or, PWOA would copy every document Edwards had requested and mail them to him, at an estimated total cost of $1,100, which included the $0.16 per page cost, mail charges, and administrative expenses. McDonald explained that the $200 administrative cost was reasonable because there were five to six boxes of documents the management company needed to go through to pull out documents that were not requested and to redact information that was protected by law.

McDonald told Edwards that, although he previously had been informed that PWOA members may only give proxies to other members and only for the purpose of voting in elections, he had continued to designate Howe, who was not a PWOA

member, as a proxy for a number of purposes, including the receipt of confidential Association information. The Association therefore would address PWOA correspondence to Edwards at his Florida residence, not at his Park Wellington unit where Howe lived, unless he was in residence at Park Wellington at the time. The Association would not deliver correspondence regarding Association matters to Howe because she was not a member of the Association. McDonald also reminded Edwards that he previously had been told not to abuse the membership list by providing it to Howe, and she warned him that the Association would file suit against him if he improperly used any of the information he was given.

On June 2, 2010, Edwards repeated his request to have Wohlford review the documents at the Association's office at a mutually agreed upon time and stated that Wohlford would bring her own copy machine.

On June 14, 2010, McDonald wrote to Edwards and stated that his refusal to pay the $200 cost of redacting confidential information and the copying costs meant he was not entitled to review the documents, pursuant to Civil Code section 1365.2, subdivision (c)(4).[3] McDonald also pointed out that Civil Code section 1365.2, subdivision (c)(5) provides that: "In addition to the direct and actual costs of copying and mailing, the association may bill the requesting member an amount not in excess of ten dollars ($10) per hour, and not to exceed two hundred dollars ($200) total per written request, for the time actually and reasonably involved in redacting the enhanced association records. . . . The association shall inform the member of the estimated costs, and the member shall agree to pay those costs,

---

[3] The statute provides that the association may bill the requesting member for copying and mailing costs and shall inform the member of the costs, and the member shall agree to pay those costs before the requested documents are copied and sent. (Civ. Code, § 1365.2, subd. (c)(4).)

before retrieving the requested documents." Because Edwards had repeatedly refused to pay the $200 costs, despite numerous requests, he did not have the right to production of the records.

McDonald also stated that Edwards was not entitled to production of the records because of his refusal to protect their confidentiality. She reiterated that the records Edwards requested were the subject of pending litigation with Stasz. Under Civil Code section 1365.2, subdivision (d)(1)(C), the Association may withhold privileged information, including documents "relating to litigation in which the association is or may become involved." Rather than withholding the records, the Association agreed to produce them, subject to Edwards' agreement to maintain their confidentiality, but he refused to do so. McDonald went on to refute a number of Edwards' other accusations.[4]

McDonald reiterated the two options she previously had presented for the review of the documents and again asked Edwards to agree to maintain the confidentiality of the records.

On June 15, 2010, Edwards replied that he agreed to pay the $200 fee for redaction and asked that the documents be made available for inspection at the PWOA office. He did not respond to the request to maintain the documents' confidentiality.

On June 28, 2010, Edwards filed a claim against PWOA in small claims court, pursuant to Civil Code section 1365.2, subdivision (f), which provides for a civil penalty of up to $500 for the refusal of his document request. Edwards asked

---

[4] According to McDonald's letter, Edwards was removed as President of the PWOA by the Association's members, and, prior to his removal, he attempted to commit the Association to a long-term contract with a "crony" to serve as the on-site manager. After he was removed as a director and President, a court found that the contract was unlawful and so voided it.

for a $2,000 civil penalty and asked the court to enforce his right to inspect the documents. His claim was denied by the court on August 23, 2010.

On July 12, 2010, Edwards wrote a letter to Park Wellington homeowners, expressing his concern about the "financial well being of our investments at The Park Wellington." Edwards stated in the letter that a recent reserve report indicated reserves of $1.9 million in 2009, but only $1.2 million for 2010 and 2011. He stated that this discrepancy led him to request Association records, but the Board spent $5,400 in legal fees to prevent him from obtaining them, so he had filed a lawsuit asking a judge to order the records produced. He stated that he feared that over $1 million was missing from the reserve account. He also excoriated the Board because the Association did not have earthquake insurance. Edwards thus encouraged the homeowners to recall the Board in a recall election.

In a July 19, 2010 letter to Park Wellington residents, Edwards said that he would like the Board "to explain what authorized them to take $160,000 from our reserve account to pay [Kent]'s legal bills, without any notice to Homeowners, when they themselves have said it is not permitted by law to do so." (Underlining and capitalization omitted.) Edwards further stated that, "The FACT is that this Board spent A MINIMUM OF $160,000 FROM OUR RESERVE ACCOUNT to get rid of Stasz – that incredible fact in and of itself is enough to warrant AT A MINIMUM getting rid of this Board."

On July 23, 2010, the Board wrote a letter to the homeowners, responding to Edwards' allegations. For example, the Board stated that Edwards' allegation that the Board paid $160,000 from the reserve account to pay Kent's personal legal fees was false. The letter explained that Kent brought the lawsuit against Stasz for the benefit of the Association, and that the suit successfully prevented Stasz from transferring Unit 129 to herself and further stealing PWOA funds. The Board

reiterated that Kent recused herself from the decision to pay the legal fees, the Board obtained independent advice about the reasonableness of the fees, and the fees were paid from the operating account, not the reserve account. The Board also addressed numerous other allegations of improprieties by Edwards.

VII. *January and August 2010 Election Meetings*

In January 2010, the PWOA was supposed to hold its annual election for new directors to the Board. Notices that a new election was scheduled in 2010 had been sent to all PWOA members in November 2009. Only one nomination was received, and ballots were sent to all PWOA members. The election meeting was held on January 15, 2010; however, only about six people were present, which was not a sufficient quorum to hold the election. Only 27 ballots were received. Edwards did not attend the meeting. Because no quorum was present, and there was no motion made to adjourn the meeting to try to obtain a lesser quorum, the election was not held, and the single nominee was not elected to the Board.

In June 2010, Edwards and ten other PWOA members submitted a petition to hold a special recall election. HOA Organizers, Inc., an independent company that serves as an inspector of elections for homeowners' associations, acted as the inspector of elections for the August 2010 recall election.

After the August 2010 special recall election failed, Edwards began accusing the Board of following improper procedures in both elections, in violation of California law. In July 2010, Edwards wrote on the blog that the Board only sent ballots to 136 out of 162 units for the recall election and described it as "election tampering." In August 2010, Edwards posted on the blog a letter to HOA Organizers, repeating his accusation that the Board sent ballots to only 136 units, instead of to all 162. He also claimed that the residents were not informed of the

election procedures, and he accused HOA Organizers of lying by telling the homeowners that proxies would not be allowed, but the Board used 30 proxies to vote to adjourn the meeting.

In October 2010, Edwards wrote several times in his blog that, at both election meetings, the Board voted to adjourn the meetings for lack of quorum, and that the Board violated California law by failing to hold an adjourned meeting with a lower quorum within 45 days. Edwards thus characterized them as an illegal Board that was not duly elected.

In a declaration, Neda Firouz, the president of HOA Organizers, Inc., refuted Edwards' claim that only 136 ballots were sent out in connection with the election. She said that, during the recall election campaign, she told Edwards that the company sent 163 ballots, not 136 ballots. Firouz further stated that she never told Edwards proxies could not be used at the recall election, and she did not believe anyone else had told him so.

Firouz was present at the August 2010 election. She said that there was not a quorum present at the meeting, so a motion was made to adjourn the meeting to a later date, but the motion was defeated. Because the motion to adjourn was defeated and there was not a quorum present, the special recall election failed. She explained that neither California law nor the Association's governing documents required that the special election meeting be postponed and held at a later date and, in fact, that procedure would have violated both California law and the Association's governing documents. Firouz attached the ballot sign-in sheet to her declaration.

VIII. *PWOA Lawsuit*

In March 2011, appellants filed a 442-page complaint against Edwards, Howe, and 50 Does, alleging defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, conspiracy, and a violation of Civil Code section 1365.2, subdivision (f). On May 9, 2011, both respondents filed anti-SLAPP motions. On May 13, 2011, appellants' counsel asked respondents' counsel for an extension of time to reply, explaining that he had been out of the office and that the June 2 hearing date was too soon to reply to the two lengthy motions. On May 16, respondents' counsel refused to stipulate to a continuance. The following day, appellants filed an ex parte application to continue the hearing, stating that the June 2 hearing date required their responses to be filed by May 19. Appellants also sought an order lifting the stay on discovery imposed by section 425.16, subdivision (g), and allowing them to take discovery of Edwards and Howe to help them meet their burden of establishing a probability of prevailing on the claim.

At a May 18, 2011 hearing, the trial court expressed concern that appellants had waited eight days after receiving the motion and were asking for an extension the day before the opposition was due. At a hearing the following day, appellants' counsel explained that, two days before the response to the complaint was due, respondents' counsel had called and asked for a 30-day extension, which appellants' counsel agreed to. Appellants' counsel then expressed in an email the expectation that they would continue to extend such courtesies to each other. Respondents filed their anti-SLAPP motion two days before their response to the complaint was due; appellants' counsel was out of the office at the time.

On May 19, 2011, the court denied the application to continue the hearing and granted appellants' application to shorten the time for a hearing on their discovery motion.

Appellants filed their opposition to the anti-SLAPP motions on May 19. On May 20, they filed a supplemental declaration by Kent, but the court excluded it on the basis that it was untimely.

On August 25, 2011, the court granted respondents' anti-SLAPP motions, ordered that judgment be entered in their favor and granted their motion for attorney fees. Appellants appeal from the order granting the motions to strike, the orders on the evidentiary objections, and the order denying the motion to continue the hearing.

DISCUSSION

I. *General Principles and Standard of Review*

"Section 425.16 (also known as the anti-SLAPP statute) was enacted 'to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights.' [Citation.] The statute provides that '[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.' (§ 425.16, subd. (b)(1).) . . .

"'"[S]ection 425.16 requires that a court engage in a two-step process when determining whether a defendant's anti-SLAPP motion should be granted. First, the court decides whether the defendant has made a threshold showing that the

challenged cause of action is one 'arising from' protected activity. [Citation.] If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim."' [Citation.] 'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute – i.e., that arises from protected speech or petitioning *and* lacks even minimal merit – is a SLAPP, subject to being stricken under the statute.' [Citation.]" (*Aguilar v. Goldstein* (2012) 207 Cal.App.4th 1152, 1158-1159.)

"An appellate court independently reviews the trial court's order granting a special motion to strike under section 425.16. [Citation.] In our evaluation of the trial court's order, we consider the pleadings and the supporting and opposing affidavits filed by the parties on the anti-SLAPP motion. In doing so, we do not weigh credibility or determine the weight of the evidence. Rather, we accept as true the evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law. [Citation.]" (*Donovan v. Dan Murphy Foundation* (2012) 204 Cal.App.4th 1500, 1506 (*Donovan*).)

"[T]o meet his or her burden, the plaintiff need only make a '"sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."' [Citation.] . . . Where the plaintiff makes a prima facie showing of probable success on the merits, the court should grant the anti-SLAPP motion only if 'as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.' [Citation.]" (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1368 (*Wong*).)

Appellants do not contest the trial court's finding that the challenged cause of action arises from protected activity. We therefore focus our inquiry on the

second prong, which is whether appellants have demonstrated a probability of prevailing on the merits of their claims. This requires appellants to "'"demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."' [Citation.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89.)

Appellants' complaint contains ten causes of action: one for libel per se, two for slander per se, two for intentional infliction of emotional distress, and two for negligent infliction of emotional distress.[5] "'Defamation constitutes an injury to reputation; the injury may occur by means of libel or slander. [Citation.] . . . [Citations.] A false and unprivileged *oral* communication attributing to a person specific misdeeds or certain unfavorable characteristics or qualities, or uttering certain other derogatory statements regarding a person, constitutes slander.' [Citation.] In addition to false statements that cause actual damage (Civ. Code, § 46, subd. 5), the Legislature has specified that slander includes a false statement that: '1. Charges any person with crime, or with having been indicted, convicted, or punished for crime; [¶] . . . [¶] 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits . . . .' (Civ. Code, § 46, subds. [1 & 3].)" (*Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, 867 (*Nguyen-Lam*).) The statements specified in Civil Code section 46 are deemed to constitute

---

[5] Appellants do not appeal the trial court's rulings as to their claims for negligent and intentional infliction of emotional distress.

slander per se, which "is actionable without proof of special damage. [Citation.]" (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 107 (*Mann*).)

Libel is "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civ. Code, § 45.) If the libelous statement is defamatory "without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, [it] is said to be a libel on its face," or "libel per se." (Civ. Code, § 45a; *Barnes–Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 386–387.)

"'"The sine qua non of recovery for defamation . . . is the existence of falsehood." [Citation.] Because the statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability. Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected. [Citation.]' [Citation.] That does not mean that statements of opinion enjoy blanket protection. [Citation.] On the contrary, where an expression of opinion implies a false assertion of fact, the opinion can constitute actionable defamation. [Citation.] The critical question is not whether a statement is fact or opinion, but '"whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact."' [Citation.]" (*Wong, supra,* 189 Cal.App.4th at p. 1370.)

Appellants do not challenge the trial court's finding that the individual appellants are limited purpose public figures. "'The limited purpose public figure is an individual who voluntarily injects him or herself or is drawn into a specific public controversy, thereby becoming a public figure on a limited range of issues.' [Citation.]" (*Cabrera v. Alam* (2011) 197 Cal.App.4th 1077, 1092 (*Cabrera*).)

Because appellants concede they are limited purpose public figures, "they have the burden of proving both that the challenged statement[s] [are] false, and that [respondents] acted with '"actual malice."' [Citations.] In this context, a defendant acts with '"actual malice"' when publishing a knowingly false statement or where he 'entertained serious doubts as to [its] truth.' [Citation.]" (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 81 (*Christian Research*).) Falsity must be established only by a preponderance of the evidence, but malice must be established by clear and convincing evidence. (*Id.* at pp. 81-84.)

"A defamation plaintiff may rely on inferences drawn from circumstantial evidence to show actual malice. [Citation.] 'A failure to investigate [fn. omitted] [citation], anger and hostility toward the plaintiff [citation], reliance upon sources known to be unreliable [citations], or known to be biased against the plaintiff [citations] – such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.' [Citation.]" (*Christian Research*, *supra*, 148 Cal.App.4th at pp. 84-85.)

II. *Evidentiary Rulings*

Appellants challenge the trial court's rulings on respondents' evidentiary objections. We "review a ruling on an evidentiary objection in connection with a special motion to strike for abuse of discretion. [Citation.]" (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1348, fn. 3.)

The trial court excluded Kent's entire supplemental declaration and sustained objections to portions of the declarations of Kent, Worman, Banas, and Brian Davidoff, president of Ross Morgan, the property management company that provided financial and administrative management services to PWOA. The court

also sustained objections to portions of Firouz's declaration regarding the August 2010 recall election meeting.

Davidoff stated in his declaration that he was "personally involved in overseeing and participating in" all the functions performed by Ross Morgan for the Association, including receiving, reviewing, and approving bills, and preparing checks for payment from both the Association operating account and the reserve account. He described the situation in which Stasz and Landis were making inappropriate charges to the Association credit card and said that he spoke with them about his concerns. He was involved in and submitted declarations in the lawsuit against Stasz. He reviewed and approved requests for the issuance of checks drawn on the Association's operating and reserve accounts.

As pertinent here, the trial court excluded the following statements on various grounds. Davidoff stated that, the entire time he worked on Association matters, there was never a request by Kent or anyone else to use funds from the Association's reserve account to pay any legal fees in connection with the Stasz suit (excluded for lack of foundation (Evid. Code, §§ 400, 403, 702) and relevance (Evid. Code, § 350)). He further stated that, at no time in 2007 or 2008 was $160,000 from the reserve account used to pay legal fees (excluded for lack of foundation and lack of personal knowledge (Evid. Code, § 702)), and that a cashier's check drawn on the operating account was used to pay the $160,000 in legal fees from the Stasz suit (excluded for lack of personal knowledge).

We conclude that the trial court erred in excluding Davidoff's statements. Under Evidence Code section 702, the testimony of a witness is admissible if he has personal knowledge of the matter. "A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony." (Evid. Code, § 702, subd. (b).) Thus, "[t]o testify, a witness must

have personal knowledge of the subject of the testimony, i.e., 'a present recollection of an impression derived from the exercise of the witness' own senses.' [Citations.] In order to have personal knowledge, a witness must have the capacity to perceive and recollect. [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 356.) Evidence Code section 403, subdivision (a)(2) places the burden on appellants to produce evidence that Davidoff had personal knowledge regarding the subject matter of his testimony.

Davidoff's declaration establishes that he had personal knowledge regarding the subject matter of his testimony. He stated in his declaration that he participated in and oversaw the receipt and approval of bills for the Association, as well as the preparation of checks for payment and mailing from either the operating or reserve account. Davidoff therefore had personal knowledge regarding the Association's payment of the $160,000 in legal fees and which account it was paid from.[6] On its face, his declaration provides the evidence of his knowledge of the subject matter. His statements accordingly do not suffer from lack of foundation or personal knowledge deficiencies. In addition, Davidoff's statements were relevant because one of the most contentious issues in the conflict between Edwards and the Board was whether the $160,000 in legal fees were paid from the Association's reserve account or the operating account. Accordingly, the trial court erred in sustaining objections to these statements.

---

[6] Davidoff's declaration establishes his personal knowledge regarding the payment. However, he also inserted that, "to the best of [his] knowledge and belief," Kent did not ask anyone else at Ross Morgan, other than him, to use funds from the reserve account. This statement was properly excluded by the trial court. (See *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1498 (*Evans*) ["An averment on information and belief is inadmissible at trial, and thus cannot show a probability of prevailing on the claim."].)

Banas testified in her declaration that, as Treasurer of PWOA, she was "intimately familiar with the payment of invoices and the status of the Association's operational and reserve accounts and [had] reviewed all the ledgers and books related thereto." The court excluded for lack of foundation her next statement: "At no time was $160,000 from the reserve account used to pay any legal fees." Similar to Davidoff, Banas' own testimony provides the evidence of her personal knowledge concerning the payment of the legal fees. This statement accordingly should not have been excluded.

The trial court sustained objections to several portions of Firouz's declaration. We find the trial court erred only in excluding, on speculation and lack of personal knowledge grounds, Firouz's statement that she never told Edwards that proxies could not be used at the special recall election.[7] Similar to Davidoff's personal knowledge of his actions, Firouz had personal knowledge that she never told Edwards that proxies could not be used.

The trial court also sustained objections to numerous portions of Kent's declaration. We agree with appellants that the trial court erred in excluding, on improper opinion, legal conclusion, and hearsay grounds, Kent's account of what happened at the January and August 2010 election meetings. Although Kent's statements regarding the requirements of California law as to homeowners association election meetings, as well as her statement that the current Board is a lawful board, were properly excluded as legal conclusions and improper opinion testimony, her statements describing the events at meetings she attended were not. For example, Kent stated that she personally attended the meetings and Edwards

---

[7] There was no abuse of discretion in excluding Firouz's statement that, "to the best of [her] knowledge and belief," no one else at HOA Organizers told Edwards that proxies could not be used. (See *Evans, supra,* 38 Cal.App.4th at p. 1498.)

did not, and that no quorum was present at either meeting. She stated that no motion to adjourn was made at the January 2010 meeting and that the motion to adjourn at the August 2010 meeting was defeated. Thus, any statements that were based on Kent's personal knowledge from her attendance at the meetings and were not legal conclusions should not have been excluded.

Appellants also contend that the trial court abused its discretion in excluding all the evidence establishing the falsity of statements concerning Edwards' accusations that approximately $1 million was missing from the reserve account. The court sustained objections to the portions of Kent's declaration dealing with the reserve account on the grounds of improper opinion testimony, legal conclusion, lack of foundation, and hearsay.

Again, Kent's statement that California law does not require any specific dollar amount to be deposited in a reserve account, and her statement that none of the appellants had embezzled money, were properly excluded as an improper opinion and a legal conclusion. However, the statements regarding the amount of money deposited in the reserve account were based on her personal knowledge as a member of the Board and were improperly excluded.

The trial court sustained objections to the following exhibits attached to Kent's declaration: an August 2, 2007 letter from PWOA to Edwards; a February 18, 2010 letter to Park Wellington residents from Edwards; the Stanzler's letter to Park Wellington residents; all the correspondence between McDonald and Edwards regarding his document request; Edwards' claim and the judgment in small claims court; July 12 and 19, 2010 letters from Edwards to Park Wellington residents; correspondence between Edwards, HOA Organizers, and McDonald regarding the recall election; the reserve study update; Edwards' letter to Kent's father; a May 1, 2008 certification of resolution adopted by the Board regarding

the payment of the Stasz suit legal fees. All of the documents were excluded for lack of foundation, and most were excluded as well on the ground of lack of authentication; some were additionally excluded on various other grounds, including lack of personal knowledge and hearsay. The court also sustained an objection on lack of foundation and lack of authentication grounds to the exhibit attached to Firouz's declaration, which was the ballot sign-in sheet for the special recall election.

"Although writings must be authenticated before they are received into evidence or before secondary evidence of their contents may be received [citation], a document is authenticated when sufficient evidence has been produced to sustain a finding that the document is what it purports to be [citation]. As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility. [Citations.]" (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321.)

In evaluating whether appellants have established a reasonable probability of prevailing on their claims, the trial court must review all admissible evidence. (*Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1147 (*Fashion 21*).) "[T]he proper view of 'admissible evidence' for purposes of the SLAPP statute is evidence which, by its nature, is capable of being admitted at trial, i.e., evidence which is competent, relevant and not barred by a substantive rule." (*Ibid.*) In *Fashion 21*, the court explained that "[e]vidence made inadmissible by the hearsay rule, the parol evidence rule or a privilege could never be introduced at trial and therefore could never support a judgment for the plaintiff. But evidence that is made inadmissible only because the plaintiff failed to satisfy a precondition to its admissibility could support a

judgment for the plaintiff assuming the precondition could be satisfied." (*Id.* at p. 1148.) The court thus held that the trial court did not err in considering a videotape that was "only excludable on the ground it lacks proper authentication," relying on "the high probability [the plaintiffs] would succeed in offering [the evidence] at trial and the 'minimal' showing necessary to overcome a SLAPP motion." (*Ibid*.)

Here, the preconditions of authentication and foundation could be satisfied by a declaration from counsel as to all of the documents that were excluded. (*The Luckman Partnership, Inc. v. Superior Court* (2010) 184 Cal.App.4th 30, 34-35 [finding that the declaration of counsel, stating that he had personal knowledge that the documents were what they purported to be, sufficiently authenticated the documents attached to his declaration, including exhibits].) Furthermore, a declaration from McDonald regarding all the correspondence between her and Edwards would be sufficient to establish authentication, as well as foundation and personal knowledge. (Evid. Code, §§ 403, 702, 1420; see also *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1527 ["[T]here are many ways correspondence can be authenticated, including by its content (Evid. Code, § 1421) and by the fact that it was a reply [citations].]; *Jazayeri*, *supra*, 174 Cal.App.4th at p. 320 ["'If a letter or telegram is sent to a person and a reply is received in due course purporting to come from that person, this is sufficient evidence of genuineness.'"].) The problems of lack of authentication, foundation, and personal knowledge as to the letter from Edwards to Kent's father could be solved by a declaration from Kent's father.

The trial court also excluded the Stanzler's letter, some of the correspondence between McDonald and Edwards, the documents in the small claims case, the reserve study update, and the Board resolution regarding the payment of fees on the basis of hearsay. The Stanzler's letter certainly was not

proffered for the truth of the matter asserted but as evidence that the letter contained the allegedly defamatory statements published by Edwards. Similarly, McDonald's letters were proffered as evidence that the Board did not refuse Edwards' document request but attempted to work with him. These documents thus were improperly excluded.

As to the record in the small claims court, under Evidence Code section 452, judicial notice may be taken of the records of any court of this state. (Evid. Code, § 452, subd. (d)(1).) On its face, the record indicates that the claim concerned Edwards' document request; however, the record does not indicate the reason the court denied Edwards' claim, stating only that PWOA did not owe Edwards any money on his claim. To the extent that the appellants proffered the record as evidence that Edwards filed a claim and did not prevail in small claims court, the record was admissible, but not as evidence of the reason he did not prevail.

The court excluded Kent's entire supplemental declaration because it was untimely under section 1005, subdivision (b). The court reminded appellants that it previously had denied their request to extend the time to file their opposition papers and noted that they had offered no reasonable explanation for the untimeliness.

Appellants rely on *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, in which the court stated: "Although authorized to impose sanctions for violation of local rules (Code Civ. Proc., § 575.2, subd. (a)), courts ordinarily should avoid treating a curable violation of local procedural rules as the basis for crippling a litigant's ability to present his or her case. . . . [I]n the absence of a demonstrated history of litigation abuse, '[a]n order based upon a curable procedural defect [including failure to file a statement required by local rule], which effectively

results in a judgment against a party, is an abuse of discretion.' [Citation.]" (*Id.* at p. 1364.)

The exclusion of Kent's supplemental declaration does not cripple appellants' case. As discussed below, the other evidence appellants submitted is sufficient to establish a prima facie showing of a probability of prevailing on their claims regarding certain of Edwards' statements. The exclusion of the supplemental declaration was not an abuse of discretion.

"On a SLAPP motion '[a]n assessment of the probability of prevailing on the claim looks to *trial*, and the evidence that will be presented at that time.'" (*Fashion 21*, *supra*, 117 Cal.App.4th at pp. 1147-1148.) Because "[l]ack of proper authentication at the SLAPP motion stage is not fatal to the plaintiff's showing of success on the merits" (*Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, 1266, fn. 11), we will consider the evidence that was improperly excluded in considering whether appellants have made a sufficient showing of facts to sustain a favorable judgment.

III. *Legal Fees in Stasz Lawsuit*

Appellants first focus on Edwards' statements regarding the payment of the $160,000 in legal fees from the Stasz lawsuit. Edwards repeatedly asserted that the $160,000 was improperly taken from the Association's reserve account, rather than the operating account, and that the fees were Kent's personal legal fees. Using appellants' numbering system in the complaint, this includes statement Nos. 12-27, 82, 83, 85, 86, 89, and 90.[8] These statements are the basis for appellants' first and

---

[8] Some of Edwards' statements are as follows. No. 12: "[W]hat authorized them [the Board] to take $160,000 from our reserve account to pay [plaintiff Ms. Kent's] legal bills, without any notice to Homeowners, when they themselves have said it is not permitted BY LAW to do so." No. 13: "Focus on the facts – this Board signed a

second causes of action (libel per se), and their fourth and fifth causes of action (slander per se).

Respondents contend that all of Edwards' statements are non-actionable opinion statements. (See *Wong*, *supra*, 189 Cal.App.4th at p. 1370.) We disagree. Edwards' assertion that the $160,000 in legal fees were paid out of the Association's reserve account, rather than the operating account, is a fact that can be proved or disproved. So, too, are his assertions that the fees were $300,000 to $400,000, and that the payment was for Kent's personal legal fees, rather than legal fees incurred on behalf of the PWOA. Likewise, Edwards' accusation that the directors stole money from the Association reserve account is a fact statement. Even the statements that are couched in the form of an opinion imply the existence of defamatory facts. (See *Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 701 (*Overstock.com*); *Wilbanks v. Wolk, supra,* 121 Cal.App.4th at pp. 902-904.) All of Edwards' statements thus are actionable.

Chaker v. Mateo (Oct. 4, 2012, No. D058753) __ Cal.App.4th __ [2012 Cal.App. Lexis 1049], is distinguishable. In that case, the plaintiff, Chaker, was

---

resolution to pay $160,000 for Melissa Kent's legal fees – this was ILLEGAL since they did not notice the Association – according to the California Civil Code." No. 14: "And WHO pays $160,000 for the personal legal fees of a Board member to her attorney/boyfriend and then continues to rack up more fees trying to collect money from people who have none? . . . Forget the recall – this Board should step down, and then we should go after recovering what was illegally obtained from us." No. 15: "[T]he Board – officially or anonymously – has never addressed the illegal withdrawal of funds from our reserve account to pay Melissa's [appellant Ms. Kent's] legal bills." No. 16: "The funds were illegally removed from our reserve account, and the check was signed by one person – not two as is required." No. 20: "To the blogger who accuses me of being a whiner – I wonder how many of us are going to be whining when we find out that we have to BY LAW repay to the reserve account by special assessment within one year any funds removed for purposes other than capital improvements. That amounts to just under $1,000 to each of us."

involved in a contentious paternity and child support dispute with the defendant's daughter. On a web site devoted to comments about "the reliability and honesty of various providers of goods and services," defendant wrote that consumers should be "scared" of Chaker, whom she described as "a criminal and a deadbeat dad" who might be taking steroids and was "into illegal activities," such as "picking up street walkers and homeless drug addicts." (*Id.* at p. *2-*3.) The court held that the statements were nonactionable opinions, reasoning that all the statements "were made on Internet Web sites which plainly invited the sort of exaggerated and insulting criticisms of businesses and individuals which occurred here. The overall thrust of the comments attributed is that Chaker is a dishonest and scary person. This overall appraisal of Chaker is on its face nothing more than a negative, but nonactionable opinion." (*Id.* at pp. *20-*21.) The court went on to reason that the comments would not be "interpreted by the average Internet reader as anything more than the insulting name calling . . . which one would expect from someone who had an unpleasant personal or business experience with Chaker and was angry with him rather than as any provable statement of fact." (*Id.* at p. *21.)

"In determining whether an opinion is actionable, we must look at the totality of the circumstances which gave rise to the statements and in particular the context in which the statements were made. [Citation.] '"This contextual analysis demands that the courts look at the nature and full content of the audience to whom the publication was directed."' [Citation.]" (*Chaker, supra,* 2012 Cal.App.Lexis 1049, at p. *16.) Here, although Edwards' statements were made on a blog, viewing all of the statements in context indicates that they would not be interpreted by the readers of the blog as simply "insulting name calling," (*id.* at p. *21), but as assertions of the fact that the Board misused Association funds for Kent's personal expenses, resulting in a financial effect on the readers of the blog.

Because appellants are limited purpose public figures, they must prove that the challenged statements were false and that respondents acted with malice. (*Christian Research, supra*, 148 Cal.App.4th at p. 81.) Respondents contend that appellants have failed to establish that Edwards' assertions that the fees were paid from the reserve fund and that they were Kent's personal legal fees were false. They further contend that appellants have failed to establish malice.

Contrary to respondents' contention, appellants did provide admissible evidence that the legal fees were not paid from the reserve account and that Edwards' assertions were false. The declarations of Davidoff, Banas, and Kent establish a prima facie showing that Edwards' accusation that the fees were paid from the reserve account was false. Davidoff had personal knowledge regarding the Association's payment of its bills and knew that the legal fees were paid by a cashier's check drawn on the operating account, not the reserve account. Banas, as Treasurer of the Association, also had personal knowledge regarding the payment of invoices and the status of both the operating and reserve accounts, and she also stated that the legal fees were not paid from the reserve account.

Kent's declaration also establishes a prima facie showing that the lawsuit was brought on behalf of the Association and that the legal fees incurred accordingly were not her personal legal fees. She states in her declaration that she brought the suit because of financial irregularities she noticed Stasz was committing with the Association credit card and Unit 129. More importantly, the finding of the trial court in the Stasz suit that Stasz was diverting the Association's reserve account funds for improper purposes by using the Association's credit card for her and Landis' personal living expenses is further evidence that the legal fees were incurred on behalf of the Association and were not Kent's personal legal fees.

Appellants accordingly have made a prima facie showing that Edwards' accusations regarding the legal fees from the Stasz suit are false.

As to malice, respondents did not object to the following statements in Davidoff's declaration, which indicate that, before Edwards made his accusations, Davidoff specifically told him several times that the fees were not paid from the reserve account but from the operating account. In approximately May 2010, Edwards asked Davidoff if $160,000 had been taken from the Association's reserve account to pay for the legal fees incurred in the Stasz suit. Davidoff told Edwards at that time that the legal fees were paid from the operating account and that no funds were withdrawn from the reserve account to pay them. Edwards called Davidoff again two months later to ask him the same question, and Davidoff again told him that no reserve account funds were used to pay the legal fees and asked him to stop bothering him about the issue.

"Traditionally, malice has included not only deliberate falsehoods but also false statements made without reasonable grounds to believe them true." (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 718 (*Hassan*).) "To establish malice, plaintiff was required to show that defendant made the allegedly defamatory statements with knowledge, or reckless disregard, of the falsity of the statements. [Citations.]" (*Cabrera, supra*, 197 Cal.App.4th at p. 1093.)

In *Cabrera*, the court held that the plaintiff failed to establish malice, reasoning that, while the defendant "explained in detail the basis for his belief" that the plaintiff had taken money belonging to the association, the plaintiff's opposing evidence did not address his accusation. (*Cabrera, supra*, 197 Cal.App.4th at p. 1093.) Here, by contrast, Edwards never explained in any of his statements the basis for his belief that the legal fees were Kent's personal legal fees and that they were paid from the reserve account. Nor does his declaration shed any light. (See

Nguyen-Lam, supra, 171 Cal.App.4th at pp. 868-869 [relying on the defendant's admission in his declaration that he had never met the plaintiff and knew of her only through media reports to find malice].)

In his declaration, Edwards described a meeting on October 29, 2007, at which "Kent's attorneys" were introduced, and the homeowners were told about the lawsuit against Stasz.[9] Edwards commented at the meeting that they should offer Stasz "ten thousand to go away." The only thing established by Edwards' declaration is that he disagreed with the strategy of suing Stasz to remove her from the Board; there is no indication of any basis for his belief that the legal fees were Kent's personal legal fees and were paid from the reserve account.

Edwards also cited in his declaration and attached as an exhibit a December 12, 2007 letter from PWOA member and resident Judy Hilsinger, upon which he apparently relied for his information. Hilsinger's letter defends Stasz and is extremely disparaging of Kent, but, as pertinent to the Stasz suit, Hilsinger states that "[a]ll of the lies that were alleged against [Stasz] and [Landis] and the board as to fiscal malfeasance were rejected by the court based on the evidence presented. However, they were a smokescreen for [Kent] and her law firm's agenda which is now to get her and her cohorts on the board so that they get paid what appears to be at least $100,000 in legal fees which had zero benefit to our association." Hilsinger goes on to state that "there was never any reason to bring a suit."

Hilsinger's account of what happened in the Stasz suit is false. The court in the Stasz suit did not reject the assertions of fiscal malfeasance. Edwards' reliance on this letter to support his accusations can reasonably be viewed as circumstantial

---

[9] The trial court sustained objections to Edwards' statements that, although the attorneys knew about Stasz's bankruptcy, the litigation continued, resulting in $209,000 in fees spent solely to remove Stasz from the Board, not to recover funds from her.

evidence of actual malice. (See *Overstock.com, supra*, 151 Cal.App.4th at pp. 709-710 [“‘“[E]vidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant’s recklessness or of his knowledge of falsity.” [Citations.] A failure to investigate [citation], anger and hostility toward the plaintiff [citation], reliance upon sources known to be unreliable [citations], or known to be biased against the plaintiff [citations] – such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.’”].)

Edwards’ declaration stated nothing about his accusation that the fees were paid from the reserve account. Thus, unlike *Cabrera*, in which the defendant “explained in detail the basis for his belief” that the plaintiff had taken money belonging to the association, Edwards did not offer any explanation for the basis for his belief that the legal fees were paid from the reserve account. (*Cabrera, supra*, 197 Cal.App.4th at p. 1093.)

Appellants submitted evidence showing that Edwards had been told his accusations were false before he published his statements, and Edwards’ evidence indicates that he had no reasonable grounds to believe them true.[10] This is similar

---

[10] Edwards states in his declaration, “I fully believed all of the statements that I made at the time I made them.” However, he never offers any basis for his belief. “[A] defendant cannot ‘automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher’s allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.’ [Citation.]” (*Reader’s Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 257.)

to *Nguyen-Lam*, in which the plaintiff, a candidate for school superintendent, submitted evidence suggesting that the defendant claimed to have inside knowledge that the plaintiff was a Communist and made that accusation to the school board. In his declaration submitted for the hearing on his anti-SLAPP motion, the defendant admitted that he had never met the plaintiff and knew of her only through media reports. However, nothing in the media reports "hinted [the plaintiff] was a Communist." (*Nguyen-Lam*, *supra*, 171 Cal.App.4th at p. 869.) Based on this evidence, the appellate court reasoned that "the trial court could reasonably conclude that because defendant had no basis for his claim plaintiff was a Communist, a jury could reasonably determine he lied in leveling the charge against her and, moreover, could infer malice from the lie. [¶] . . . As the trial court correctly understood, 'malice may be inferred where, for example, "a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call." [Citation.]' [Citation.]" (*Ibid.*) Accepting as true the evidence favorable to appellants, a reasonable trier of fact could conclude that Edwards acted with at least reckless disregard for, if not actual knowledge of, the falsity of his statements, and that he made the statements without reasonable grounds to believe them true.

The allegedly defamatory statements charged appellants with the crime of stealing money from the reserve account and using Association funds to pay a Board member's personal legal expenses, matters that constitute "a serious breach of fiduciary duty." (*Silk v. Feldman* (2012) 208 Cal.App.4th 547, 556 (*Silk*).)[11]

---

[11] In *Silk*, the plaintiff, a member of the board of directors of a homeowners association, was accused by another director of overseeing litigation in which the association was involved in order to obtain parking spaces for her personal use. The court found that the accusation was libelous per se and affirmed the denial of the motion to strike. (*Silk*, *supra*, 208 Cal.App.4th at p. 556.)

Appellants have made a sufficient prima facie showing of facts to sustain a favorable judgment if their evidence is credited. (See *id.* at p. 554 [relying on the declarations of the plaintiff and the president of the board of directors to find that Silk demonstrated a probability of prevailing on her defamation claim, reasoning that "[a]ny reasonable trier of fact who found Silk's evidence credible would conclude she engaged in no wrongdoing," and that the defendant "points to no evidence that would defeat Silk's evidence as a matter of law"].) None of the allegedly defamatory statements regarding the legal fees are properly subject to the special motion to strike.

IV. *Stanzler Eviction*

Appellants also contend that Edwards' statements following the Stanzler eviction were defamatory (Nos. 1-11). These statements support appellants' eighth cause of action for libel per se.

Most of Edwards' statements are opinion statements. These include his assertions that an "incredibly shocking" example of the Board's malfeasance is seen in Stanzler's letter, the Stanzlers "hastily" moved out on Christmas Eve, and their daughter was "robbed" of her Christmas.[12] However, a few of Edwards' statements are actionable statements of fact, such as his assertions that the Board

---

[12] The first assertion was made in Edwards' letter circulating Stanzler's letter, and the second two were in Stanzler's letter, which Edwards published by distributing it. (See *Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 26 (*Jackson*) ["when a party repeats a slanderous charge, he is equally guilty of defamation, even though he states the source of the charge and indicates that he is merely repeating a rumor"].)

did not inquire into the circumstances of the altercation on December 13, and that the Board evicted the family on Christmas Eve.[13]

According to Kent's declaration, PWOA did investigate the incident and watched the security videotape, which showed that Stanzler and Yameogo assaulted and beat the woman without justification.[14] Kent also stated that, despite the three-day notice, the family was told they had until January 22 to move out.

Edwards states in his declaration that, in December 2009, he was "awakened at 3:30 in the morning by a foul-mouthed, obviously drunk woman screaming obscenities as loud as she could." He asserted that he knew the Stanzlers were "two very nice people with a beautiful daughter who at that time was about 18 months old." He stated that he was shocked when the Stanzlers were evicted, and he speculated that, "if the Board wanted to give this family 30 days to move out, then why not serve them with a 30-day eviction notice?"[15]

---

[13] The following statements accordingly are actionable: No. 6 ("[W]ithout even a proper examination of all that occurred [the building manager at the time served the Stanzlers with a three-day eviction notice seeking] to evict our family on Christmas Eve."); No. 7 ("[T]here was no inquiry, or examination conducted by the Board of Directors or the Management Company as to the facts and circumstances which occurred on the evening of December 13th."); and No. 11 (The Board "evicted the family renting unit #129 on Christmas Eve last year."). Statement numbers 6 and 7 were in Stanzler's letter, which Edwards published, and number 11 was published by Edwards on the blog.

[14] The trial court sustained objections to Kent's statements regarding the Board's investigation of the incident and the eviction, based on improper opinion, legal conclusion, and hearsay. Her statements describing the Board's actions are based on her personal knowledge and so should not have been excluded.

[15] The trial court sustained an objection to this statement on the grounds of speculation, improper opinion testimony, lack of personal knowledge, and legal conclusion.

Edwards stated in his declaration that the reason he believed the Board did not investigate the incident was that the Board never contacted him, Edwards, to explain what he heard that night. Kent's declaration states that the Board "conducted a full investigation of the subject incident," and that the Stanzlers were seen on the videotape "physically assaulting and battering a guest of a PWOA owner/member without justification." The sole basis for Edwards' assertion that the Board did not investigate the incident was that they did not ask him about it.

"'[M]alice may be inferred where, for example, "a story is fabricated by the defendant, [or] is the product of his imagination,"'" (*Nguyen-Lam, supra*, 171 Cal.App.4th at p. 869) and it includes "false statements made without reasonable grounds to believe them true." (*Hassan, supra*, 31 Cal.4th at p. 718.) A reasonable trier of fact could infer that Edwards had no reasonable grounds to believe that the Board did not investigate the incident, and that he seemed to fabricate this accusation.

We must accept as true the evidence favorable to the plaintiffs and view the defendants' evidence only to determine if it has defeated the plaintiffs' evidence as a matter of law. (*Silk, supra*, 208 Cal.App.4th at p. 554.) Doing so, Kent's declaration establishes a prima facie showing of the falsity of both of Edwards' assertions and his reckless disregard for the falsity of his statements that the Board did not investigate the incident or allow the Stanzlers more than three days to move out. Accusing the Board of evicting a family without cause and on Christmas Eve exposed them to "hatred, contempt, ridicule, or obloquy." (Civ. Code, § 45.) We find that appellants have made a sufficient prima facie showing of facts to sustain a favorable judgment if their evidence is credited.

V. *Recall Election Meetings*

Another group of allegedly defamatory statements (Nos. 28-51, 84, 87, and 88) concerns the January 2010 and August 2010 election meetings. These form the basis for appellants' sixth and seventh causes of action for libel per se.

In these statements, Edwards accused the Board of improprieties, such as sending ballots to only 136 out of the 162 units at Park Wellington. He also accused the Board of violating statutory requirements regarding the procedure to be followed when a meeting is adjourned for a lack of quorum. For example, in statement Nos. 28-29, Edwards asserted on the blog that, "On two separate occasions – first in January 2010 at the Homeowners' general election meeting, and again in August 2010 at the recall election meeting – the Board voted to adjourn the meeting because of a lack of quorum. Under California law, the Board has 45 days to hold an adjourned meeting with a lower quorum requirement – AND NO OTHER BUSINESS CAN BE DONE PRIOR TO THE BUSINESS OF THE ADJOURNED MEETING BEING TRANSACTED. The board ON BOTH OCCASIONS did not hold the required second meeting with a lower quorum."[16]

---

[16] In No. 30, he wrote: "The California civil code governing Homeowners' Association elections states that if quorum is not met at an election meeting, an adjournment meeting must be held with a lowered quorum within 45 days. And no business can be conducted until the election meeting is held. The Board is ignoring this as well." Statement No. 31 asserts: "They have held a general meeting in September, and they plan an executive session meeting on October 24th. Both are in violation of the civil code governing condominium associations which states that no other business can be done prior to the business of the adjourned meeting being transacted." And in Nos. 32 and 33: "As it stands, we have an illegal Board, not duly elected, who are acting without the authority of the Homeowners' Association and holding illegal executive session meetings. Each Board member can be held personally liable for any and all actions they have taken since March 2010."

In Nos. 38-40, he wrote on the blog: "First of all, you were made aware of the fact that only 136 of the 162 ballots were sent out."

Edwards' accusation that the Board did not send out ballots to all the homeowners is not an opinion statement, but a provable statement of fact. Edwards' description of the election as a "sham," as well as his accusations that the Board was "illegal" and that it "fixed" the election, are opinion statements. However, a statement in the form of an opinion is actionable if it implies the existence of undisclosed defamatory facts. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 266; *Wilbanks, supra*, 121 Cal.App.4th at p. 902 [holding that, although the defendant's "express and/or implied assertions of incompetent and unethical business practices could be viewed as statements of opinion," they implied as fact that the plaintiffs engaged in wrongful conduct and so were actionable].)

Respondents argue that the statements are not actionable because they disclose the information upon which the opinion is based. "'Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications . . . .' [Citation.]

"Thus a false statement of fact, whether expressly stated or implied from an expression of opinion, is actionable. [Citation.] The key is not parsing whether a published statement is fact or opinion, but 'whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.' [Citation.] And, when deciding whether a statement communicates or implies a provably false assertion of fact, we use a totality of the circumstances test. [Citation.] This entails examining the language of the statement. '"For

words to be defamatory, they must be understood in a defamatory sense . . . . [¶] Next, the context in which the statement was made must be considered.'" [Citation.] The contextual analysis requires that courts examine the nature and full content of the particular communication, as well as the knowledge and understanding of the audience targeted by the publication. [Citation.]" (*Overstock.com, supra*, 151 Cal.App.4th at p. 701.)

Edwards' statement on the blog[17] that "we have an illegal Board, not duly elected, who are acting without the authority of the Homeowners' Association and holding illegal executive session meetings" "suggests a knowledge that plaintiffs engaged in unethical or incompetent practices . . . ." (*Wilbanks, supra*, 121 Cal.App.4th at p. 902.) Moreover, Edwards was a former Board member, and the other Park Wellington residents to whom the blog was directed presumably did not have "the knowledge and understanding" of the alleged statutory violations that Edwards claimed to have. (*Overstock.com, supra*, 151 Cal.App.4th at p. 701.) The totality of the circumstances indicates that Edwards' statements are actionable statements of fact. The next question is whether appellants have established that the accusations are false and that Edwards acted with malice when he made the statements.

Kent stated in her declaration that she personally attended both election meetings and Edwards did not, and that no quorum was present at either meeting. She stated that no motion to adjourn was made at the January 2010 meeting and that the motion to adjourn at the August 2010 meeting was defeated.

---

[17] According to Kent's declaration, Edwards stated at a February 28, 2011 open PWOA Board meeting that the Board was illegal, fixed the recall election, and had no legal right to be a board. These are statement Nos. 84, 87, and 88.

Edwards' declaration did not address the January 2010 election at all, and there is no explanation for his assertions on the blog that California law required the Board to hold an adjourned meeting within 45 days. Thus, similar to Edwards' statements that the legal fees were paid from the reserve account, there is no evidence indicating the basis for his belief that the January 2010 election was improper. (*Cabrera*, *supra*, 197 Cal.App.4th at p. 1093.)

As to the August 2010 recall election, Edwards gave in his declaration his account of what occurred at the meeting, which differs from the evidence submitted by appellants.[18] Edwards, however, did not state that he attended the meeting, whereas Kent stated that she did attend the meeting and that neither Edwards nor Howe did.

Firouz stated in her declaration that Edwards spoke with her during the campaign for the August 2010 recall election and told her that only 136 ballots had been sent out, but she told him that 163 ballots were sent, not 136. By contrast, Edwards stated in his declaration that "the woman in charge" at HOA Organizers, presumably Firouz, told him they sent out only 136 ballots. Firouz's declaration and the ballot sign-in sheet support the truth of her statements. Accepting appellants' evidence as true, Edwards' assertion that Firouz told him otherwise does not defeat appellants' evidence as a matter of law. (*Donovan*, *supra*, 204 Cal.App.4th at p. 1506.)

As to malice, appellants argue that Edwards knew his accusations that the Board violated California law in its conduct of the recall elections (statement Nos. 43-45) were false. They contend that, as a former Board member, Edwards was

---

[18] The trial court sustained an objection to Edwards' assertion that the Board "pulled out 30 proxies and used them not to make a quorum for the election, but to adjourn the meeting without a lower quorum, contrary to PWOA bylaws."

familiar with the bylaws and so knew his allegations that the Board did not follow proper procedure were false. The bylaws do not mention any requirement that a meeting be held within 45 days of an adjourned meeting.

Appellants further point out that one of the reasons Edwards cited on the blog for the alleged illegality of the August 2010 election was "the presence of the attorney from Adams Kessler – in violation of Civil Code 1363.05(B)." Yet, the statute he cited has no relevance to this allegation.

Edwards has never cited any support for his repeated assertion that California law required the Board to hold another meeting within 45 days, which was the primary basis for his accusation that the Board was illegal. His declaration focused on the events of the August 2010 meeting, which he did not attend, and entirely omitted any reference to the alleged 45-day rule.

Appellants have proffered evidence establishing that Edwards was told that his assertion that only 136 ballots were sent was incorrect, but he persisted in the accusation. The bylaws proffered by appellants support their contention that there is no 45-day rule, and Edwards himself has dropped any reference to the alleged rule, despite his repeated assertions on the blog that appellants violated California law by failing to abide by the alleged 45-day rule. He cited a specific statute on the blog to support his accusation that the election was illegal, but that statute was irrelevant to his claim. Because Edwards apparently had no basis for his claim the election violated the law, and he appeared to have fabricated the accusation, "a jury could reasonably determine he lied in leveling the charge[s] against [appellants] and, moreover, could infer malice from the lie." (*Nguyen-Lam*, *supra*, 171 Cal.App.4th at p. 869.) Appellants have established a prima facie case that Edwards acted with a reckless disregard for the falsity of his statements regarding the elections.

VI. *Edwards' Document Request*

Statement Nos. 52-55 concern Edwards' request to review Association documents. These form the basis for appellants' ninth cause of action, libel per se.

Statement Nos. 52 and 54 are from Edwards' July 12, 2010 letter to PWOA residents.[19] However, we conclude below that this letter is protected by the litigation privilege. (See section IX.A., below.) We therefore do not consider the statements contained therein.

Nos. 53 and 55 are from October 29, 2010 entries on the blog. In No. 53, Edwards writes: "Does anyone believe that a small claims lawsuit to obtain financial records the Board refuses to release is frivolous?" No. 55 states: "[W]hen the Board refused my request to look at financial records [t]hey hid behind unresolved litigation claiming discovery issues, and the Board prevailed. Even though the case is several years old, discovery is long over, and nothing in our current financial records could be relevant to a 2-year old case."

The record indicates that the Board did not refuse Edwards' request, but instead followed the procedures set forth in Civil Code section 1365.2, which addresses a member's request for association records. The Board's requirement that Edwards pay copying, mailing, and redaction costs is in accordance with

---

[19] In No. 52, Edwards states: "They wanted to charge me to redact sensitive information from the records, then they wanted me to sign away my rights to disseminate any of the sensitive information that they were going to redact?? It sure seems that they have something to hide, and the reason I would not sign away my rights is that I plan to disseminate information – if in fact it bears out my suspicions – to a special sheriff's investigator who handles attorney malpractice; the Los Angeles District Attorney's Office and The California State Bar Association." No. 54 states: "The Board in their own writings admits to spending $5,400 in legal fees to keep me from seeing the records."

subdivision (c)(1), and their prerogative to deny the request if they reasonably believed the information would not be used for a purpose related to Edwards' interest as a member is in accordance with subdivision (a)(1)(I)(ii). In addition, subdivision (d)(1) addresses an association's right to withhold or redact information for confidentiality purposes, including documents relating to litigation in which the association is or may become involved. Edwards' assertions that his request was refused thus are demonstrably false.

As for malice, PWOA's attorney, McDonald, repeatedly explained these requirements to Edwards in her correspondence with him. Edwards complained that there was no statute limiting his right to view the records, so, in a June 14, 2010 letter, McDonald cited and quoted the statutory provisions for him. After he received this letter from McDonald, Edwards agreed to pay the $200 fee for redaction, but he refused to agree to maintain the confidentiality of the records or comply with the other requests. As noted above, he then filed his suit in small claims court, which he lost. Nonetheless, Edwards went on to assert that the Board simply refused to allow him to view the records, insinuating that they had something to hide.

Edwards was made aware of the provisions of Civil Code section 1365.2 before he made his accusations. In his declaration, Edwards states that McDonald "stonewalled" his attempts to view the documents by imposing "ridiculous conditions," such as the $200 administrative fee plus $1,100 in postage, citing section 1365.2. Yet the conditions imposed by McDonald to view the documents are supported by the plain language of the statute. Given that Edwards often supported his accusations with references to "California law," and he specifically was referred to Civil Code section 1365.2, a trier of fact could reasonably conclude that his accusations were based on a willful disregard for the very law he cites.

This inference is sufficient to show that Edwards acted with malice when he made the statements. Accepting appellants' evidence as true, Edwards' evidence does not defeat that submitted by appellants as a matter of law.

VII. *Reserve Account*

Statement Nos. 56-60 concern the reserve account and were used as the basis for appellants' third cause of action, libel per se. No. 56 is from an April 26, 2010 blog entry: "Our reserve account, which is supposed to grow by $25,000 monthly, has not grown significantly over the past year. And, there have been no substantial capital expenditures." Nos. 57-59 are from the July 12, 2010 letter, and therefore are protected by the litigation privilege.[20] Statement No. 60 is from an October 26, 2010 blog entry: "We have 1.5 million dollars of our reserve account invested in the BANKRUPT government mortgage company Freddie Mac...GENIUS!"

These statements from the blog are merely statements of opinion and are not defamatory in any event, and so are not actionable. (*Wong*, *supra*, 189 Cal.App.4th at p. 1370.)

---

[20] The statements are as follows: (57) "I hope that I am wrong, but when you add up the funds missing from our reserve account plus the lack of deposits into the reserve account, it could potentially amount to over 1 million dollars that's missing."; (58) "A recent reserve report was very confusing. It starts by quoting 2009 figures that give the impression the reserves are $1,900,000, but on the back page in small print, they indicate the budget for 2010/2011 with a reserve amount of less than $1,200,000. This discrepancy led me to request a review of the Association records."; (59) "If we had $1,900,000 in the reserve account in 2009 and $700,000 was deposited over the past two years, as was stated in the Board's letter, we should have $2,600,000 in our reserves, minus any capital improvement expenditures. One would think they would be proud to show anyone the records."

VIII. *Miscellaneous Statements*

Appellants also allege that a number of miscellaneous false statements by Edwards defame the ethics or competence of the Board (Nos. 61-67, 69, 91-92). The statements are as follows:

No. 61. "Homeowners are being denied access to meetings through their proxy holders."

No. 62. "Our attorney is being investigated by the D.A.'s office."

No. 63. "Real estate people who help buy and sell units here feel that we have lost a valuable asset by removing the pool table."

No. 64. "There's a plan to eliminate the tennis court."

No. 65. "When it was brought to the Board's attention that the treadmills in the gym were in need of repair/replacement and homeowners were actually being injured while using them, the Board's response was that the Association would not be liable."

No. 66. "there is a plan to renovate the PWOA [U]nit again and turn it over to our newly appointed manager."

No. 67. "Have you heard the latest? Nick, our newly appointed manager, has fired our gardeners without cause. Not only does it leave us open for a Breach of Contract lawsuit, but he has hired back the old company who were charging us outrageous fees, and replacing plants every year that did not need to be replaced. Why would we fire a company that has worked well for many years (the same company that does the gardens for the Sunset Marquis) and replace them with a company that we once got rid of for ripping us off!"

No. 69. "Are you aware that because of the Stasz litigation people cannot get mortgages to purchase or refinance properties in Park Wellington?"

No. 91. "[Kent] cannot be convinced of the fact that installing her boyfriend, Nick Boskovich as building Manager is a conflict of interest."

No. 92. "to what end [was the $160,000 of legal fees spent on the Stasz Suit] to eliminate Shanel Stasz, a woman in bankruptcy who had been served with a thirty day eviction notice? If we had done nothing the result would have been the same."

These statements are either statements of opinion or are not defamatory because they do not expose appellants to hatred, contempt, or ridicule.[21]

IX. *Privileges*

A. *Litigation Privilege*

Respondents contend that all of the statements are protected by the litigation privilege under Civil Code section 47, subdivision (b), which protects as privileged any publication made in a judicial proceeding.[22] "'The principal purpose of [the litigation privilege] is to afford *litigants and witnesses* . . . the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions.'" (*Schoendorf v. U.D. Registry, Inc.* (2002) 97 Cal.App.4th 227, 241.)

"A four-part test determines whether a statement is within the litigation privilege. 'To be privileged a statement must (1) be made in a judicial proceeding,

---

[21] For example, statement No. 62, "Our attorney is being investigated by the D.A.'s office," might be viewed as defamatory of the attorney but not of appellants. No. 64, "There's a plan to eliminate the tennis court," is not defamatory.

[22] Respondents rely only on Civil Code section 47, but the litigation privilege found therein has been interpreted in a similar manner to section 425.16, subdivision (e)(2), which provides that an "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes . . . any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law."

(2) by litigants or other authorized participants, (3) aim to achieve the litigation's objects, and (4) have some logical connection or relation to the proceeding. [Citation.]' [Citation.]" (*Silk, supra*, 208 Cal.App.4th at p. 555.) The litigation privilege "reflect[s] a legislative determination that 'witnesses should be free from the fear of protracted and costly lawsuits which otherwise might cause them either to distort their testimony or refuse to testify altogether. [Citations.]' [Citation.]" (*Moore v. Conliffe* (1994) 7 Cal.4th 634, 642.) "The privilege extends to 'any publication . . . that is required [citation] or permitted [citation] by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is invoked.' [Citation.] Accordingly, courts have extended the privilege to the sending of a prelitigation demand letter [citation]; recording of a notice of lis pendens [citation]; publishing of an assessment lien [citation]; filing of a hospital lien [citation]; and filing of a mechanic's lien [citation]." (*A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1126-1127 (*A.F. Brown*).) A prelitigation statement is protected only "'when the statement is made in connection with a proposed litigation that is "contemplated in good faith and under serious consideration. [Citation.]" [Citations.]' [Citation.]" (*Id.* at p. 1128.)

In order for statements to bear a connection or logical relation to an action, "the communicative act must be a useful step in the litigation process and serve its purposes in order to come under the protection of the litigation privilege, which was established to protect those seeking relief through the court system. [Citation.]" (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 241 (*Sipple*).)

Most of Edwards' statements do not satisfy the four requirements. None of his statements on the blog were made in connection with a judicial proceeding, and it is difficult to characterize his comments on the blog as "a useful step" in any litigation, even if we assume they were made in connection to any pending litigation. (*Sipple*, *supra*, 71 Cal.App.4th at p. 241.)

As to Edwards' comments regarding the $160,000 in legal fees, he was not a participant in the litigation against Stasz as a named party or witness. "Nonparticipants and nonlitigants to judicial proceedings are never protected from liability under section 47(b). [Citations.]" (*Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1304.) Edwards argues that he was a participant in the suit against Stasz because he is a member of the Association. Even if he were to be considered a participant on this theory, an issue we do not decide, his statements did not aim to achieve the litigation's objects, which were to stop Stasz from using the Association credit card for her and Landis' personal expenses and from taking Unit 129 for herself. Edwards' repeated accusations that the legal fees were Kent's personal fees and were paid from the wrong Association account were not aimed to achieve the litigation's objects, but instead undermined the litigation's objects. (See *Silk*, *supra*, 208 Cal.App.4th at p. 555 [finding the litigation privilege inapplicable where a board member of a homeowners association wrote a letter "cataloguing the board's alleged malfeasance," which was contrary to the objective of obtaining a litigation result favorable to the association].)

Respondents also argue that the litigation privilege applies to Edwards' statements regarding the Stanzler eviction because those were prelitigation comments. There is nothing in Stanzler's letter or Edwards' letter about pending or proposed litigation. In order for the litigation privilege to apply, "a lawsuit or some other form of proceeding must actually be suggested or proposed," and the

proposal "must be made *in good faith*." (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 34-35.) There is no evidence that there was even "a mere possibility or vague 'anticipation' of litigation" regarding the Stanzler eviction. (*Id.* at p. 33.) The litigation privilege accordingly does not apply to these statements.

Respondents further contend that Edwards' July 12 and 19, 2010 letters to homeowners are protected by the litigation privilege because they were written in the midst of his suit in small claims court, citing *Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1 (*Healy*). The July 19, 2010 letter explicitly states that it is written to Park Wellington residents in response to a letter from the Board. The letter says nothing about the small claims suit and is part of a dispute between Edwards and the Board over their reputations in the eyes of the Park Wellington residents. It is not protected by the litigation privilege.

As to the July 12, 2010 letter, it is true that Edwards mentions the small claims suit, stating, "I have filed a lawsuit requesting a judge order them to produce the records for inspection." His letter does not have any logical connection to the small claims suit or serve its purposes. However, under *Healy*, this letter appears to be protected by the litigation privilege.

In *Healy*, the homeowners association filed a complaint against one of the homeowners, alleging that she wrongfully denied the association access to an area over which the association had maintenance obligations to reduce fire hazard by performing weed abatement. The association's attorneys sent a letter to the other residents, explaining that the landscapers would be performing weed abatement at an additional cost to the association, and that this was due to the one homeowner's refusal to allow access. The letter further stated that a lawsuit was filed against that homeowner and attached a copy of the disclosure letter. The appellate court

held that the litigation privilege applied, reasoning that "[t]he letter expressly refers to the litigation arising from [the plaintiff's] prohibition on ingress and egress for weed abatement purposes and refers to an enclosed disclosure letter. . . . Because one purpose of the letter was to inform members of the association of pending litigation involving the association, the letter is unquestionably 'in connection with' judicial proceedings [citation] and bears '"some relation"' to judicial proceedings. [Citations.]" (*Healy*, *supra*, 137 Cal.App.4th at pp. 5-6.)

Healy and its progeny have been held to "stand for the proposition that a statement is 'in connection with' litigation under section 425.16, subdivision (e)(2) if it relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation." (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1266.) Edwards does make one reference to the small claims suit in the July 12 letter, and the other Park Wellington homeowners are persons who might have some interest in the suit. Under *Healy*, therefore, the letter is protected by the litigation privilege.

Respondents also assert that statement Nos. 89-92 are privileged because they were contained in the March 7, 2010 letter Edwards wrote to Kent's father and so were written during the pendency of the instant litigation. We disagree. Kent's father had nothing to do with this litigation. The litigation privilege does not protect "statements made outside of the courtroom to nonparties unconnected to the proceedings. [Citations.]" (*Begier v. Strom* (1996) 46 Cal.App.4th 877, 882.)

We reject Edwards' argument that statement Nos. 28-51, 33, 35, 37, 40, 46, 61-67, 69, and 82-88 were privileged because he "seriously contemplated litigation" around the time he made them. Edwards has not established that a

lawsuit was under "serious consideration" at the time of the statements. (*A.F. Brown*, *supra*, 137 Cal.App.4th at p. 1128.)

B. *Common Interest Privilege*

Respondents also contend that some of the statements were privileged under the common interest privilege in Civil Code section 47, subdivision (c)(1), which "extends a conditional privilege against defamation to statements made without malice on subjects of mutual interests. [Citation.] This privilege is 'recognized where the communicator and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest.' [Citation.] The 'interest' must be something other than mere general or idle curiosity, such as where the parties to the communication share a contractual, business or similar relationship or the defendant is protecting his own pecuniary interest. [Citation.]" (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 287.) The statute "codifies the common law privilege of common interest, 'which protected communications made in good faith on a subject in which the speaker and hearer shared an interest or duty. This privilege applied to a narrow range of private interests. The interest protected was private or pecuniary; the relationship between the parties was close, e.g., a family, business, or organizational interest; and the request for information must have been in the course of the relationship.' [Citations.]" (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 914 (*Kashian*).)

"Application of the privilege involves a two-step analysis. The defendant has the initial burden of showing the allegedly defamatory statement was made on a privileged occasion, whereupon the burden shifts to the plaintiff to show the defendant made the statement with malice. [Citation.]" (*Kashian*, *supra*, 98 Cal.App.4th at p. 915.)

If malice is shown, the privilege does not apply. (*Kashian*, *supra*, 98 Cal.App.4th at p. 915.) Malice in this context means "'"a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person."' [Citation.]" (*Ibid.*) The malice required to defeat a qualified privilege also may be established "'"by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights. [Citations.]"'" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 721; *Noel v. River Hills Wilsons, Inc.* (2003) 113 Cal.App.4th 1363, 1370 (*Noel*).)

Edwards' statements were made not only to members of PWOA, but residents, who may have been tenants, not homeowners. His statements also were made on the blog, which was available to anyone who read the blog. (See *Wilbanks*, *supra*, 121 Cal.App.4th at p. 895 [finding that the defendant's statements were made in a public forum because they were "published in her Web site on the Internet, meaning that they are accessible to anyone who chooses to visit her Web site"].) However, we need not determine whether his statements were "so widely disseminated as to . . . defeat the privilege's purpose," (*Hawran*, *supra*, 209 Cal.App.4th at p. 288) because appellants have shown malice.

As discussed above, appellants have established that many of Edwards' statements were made without reasonable grounds for belief in the truth of the statements. The evidence shows that Edwards was not merely negligent "'in the sense of oversight or unintentional error,'" but he repeatedly showed "'a reckless or wanton disregard for the truth'" in accusing appellants of such misdeeds as using Association funds for personal legal fees, violating California law and PWOA governing documents regarding Association elections, and mismanaging or embezzling Association funds. (*Noel*, *supra*, 113 Cal.App.4th at p. 1371.)

The common interest privilege accordingly does not apply. (See *Kashian, supra*, 98 Cal.App.4th at p. 914 ["'[I]f malice is shown, the privilege is not merely overcome; it never arises in the first instance.'"].) Even assuming a close relationship between Edwards and all the residents of Park Wellington, which included non-members of PWOA, as well as anyone who read the blog, appellants have established a basis for malice, which, if credited, means that the common interest privilege does not arise.

X. *Appellants' Request for Discovery*

Appellants contend that the trial court abused its discretion in denying their request to lift the stay on discovery imposed by section 425.16, subdivision (g), in order to discover evidence of malice. In light of our finding that appellants' evidence made a sufficient prima facie showing of malice, we need not reach this issue.

XI. *Claims Against Howe*

The trial court dismissed the claims against Howe on the basis that Howe merely acted as Edwards' assistant. The court reasoned that appellants had failed to put forth any evidence to rebut the declarations of Howe and Edwards that Howe was only a "conduit" for Edwards' statements. The court relied on the principles that "only one 'who takes a responsible part in the publication is liable for the defamation,'" and that "the distributor of allegedly libelous materials cannot be held liable unless it is shown that he either knew of its libelous content or knew of facts which imposed a duty to investigate. [Citation.]" (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 549.)

Appellants contend that the doctrine relied upon by the court was created to protect libraries and news vendors, which are liable only when they take a responsible part in publishing statements. They rely on the holding in *Jackson* that "when a party repeats a slanderous charge, he is equally guilty of defamation, even though he states the source of the charge and indicates that he is merely repeating a rumor. [Citation.]" (*Jackson, supra*, 68 Cal.App.4th at p. 26.)

Howe was not repeating Edwards' allegedly defamatory statements. Rather, Edwards' and her declarations establish that she was merely following Edwards' instructions in transcribing and posting his comments, and appellants have put forth no evidence to contradict these declarations. Howe worked for Edwards, who is not computer savvy. At Edwards' request, Howe typed up his correspondence, including letters, emails, and the comments for the blog. Edwards gave Howe instructions on what to write, and Howe did not edit or add to any of his statements. The uncontradicted evidence establishes that Howe did not take any responsible part in the publication of Edwards' statements. Instead, her role was analogous to a typesetter who merely prints the article that someone else wrote. The trial court accordingly did not err in dismissing the claims against Howe.

XII. *Claims by PWOA*

Appellants argue that the trial court erred in striking PWOA's claims. Respondents argue that the order should be affirmed because PWOA failed to state any cause of action or properly plead and prove pecuniary damages.

The trial court found that appellants conflated the claims of the Association with those of the individual plaintiffs and that the only basis for the Association's claims was the defamation of its members. The court stated that "a business entity

may not maintain a defamation action if the allegedly defamatory material is really directed against a board member," citing *Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 6 (*Palm Springs*). The court further reasoned that there was no evidence of damages to PWOA's business reputation.

Palm Springs is inapposite. There, the allegedly defamatory statements were that the president of the plaintiff corporation attempted to assault someone, raised his voice, and insulted someone else during a board meeting. The trial court sustained demurrers, and it was affirmed on appeal. The appellate court acknowledged that corporate entities may bring actions for defamation but stated that, "if language written about a corporate officer cannot be interpreted as saying anything about the way that officer performs his or her duties and responsibilities as an officer of the corporation, so as to have a natural tendency to affect the corporation disadvantageously in its business, the corporation has no right of action. Stated another way, words written about a corporate officer give no right of action to the corporation unless spoken or written in direct relation to the trade or business of the corporation. [Citation.]" (*Palm Springs, supra*, 73 Cal.App.4th at p. 6.)

In *Palm Springs*, the statements, accusing the president of the board of assaulting and insulting someone, were "written not about the board as a whole or its ability to function adequately." (*Palm Springs*, *supra*, 73 Cal.App.4th at p. 6.) Here, by contrast, the statements were written about both the individual plaintiffs and the Board as a whole, and the statements specifically questioned the Board's ability to function adequately. For example, Edwards made the following accusations on the blog. "Focus on the facts – this Board signed a resolution to pay $160,000 for Melissa Kent's legal fees – this was ILLEGAL since they did not notice the Association – according to the California Civil Code." "[T]he Board . . .

NEVER ONCE addressed the fact that they have taken $160,000 to pay legal bills without noticing the Association members." "[T]he Board voted to adjourn the meeting because of a lack of quorum," and violated "California law" by failing to hold an adjourned meeting within 45 days.

In *Palm Springs*, "the allegedly libelous statements obviously [did] not directly relate to the trade or business of [the corporation]." (*Palm Springs, supra*, 73 Cal.App.4th at p. 6.) Here, it is clear that the allegedly defamatory statements do directly relate to the business of the Association – the payment of bills from the correct Association account, the conduct of election meetings, and the decision to evict tenants all directly concern the Association's business.

Respondents argue that PWOA cannot provide evidence of pecuniary damages. However, Edwards' accusations that the Board violated California law in a variety of ways are defamatory "without the necessity of explanatory matter," (Civ. Code, § 45a) and so are libelous per se. "[B]ecause the alleged statements tend to injure [PWOA] in its business reputation, . . . [it] was not required to prove that it suffered any damages."[23] (*Mann, supra*, 120 Cal.App.4th at p. 107.) Moreover, "'[a] motion to strike under section 425.16 is not a substitute for a

---

[23] Respondents cite *Anschutz Entertainment Group, Inc. v. Snepp* (2009) 171 Cal.App.4th 598, 643 to argue that a corporate appellant must demonstrate damages even in a defamation per se case, but that case dealt with the retraction statute (Civ. Code, § 48a), which applies to libel in newspapers or slander by radio broadcasts. The court held that the plaintiff was limited to special damages pursuant to the statute because it did not serve a legally effective retraction demand, stating that "*Special damages* must be specially pled in a defamation case. [Citations.]" (*Ibid.*, italics added.) The court cited *Gomes v. Fried* (1982) 136 Cal.App.3d 924, 939, which distinguished between libel per se and "'[d]efamatory language not libelous on its face[, which] is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof.'" Not only is Civil Code section 48a not pertinent here, but appellants have alleged and made a prima facie showing of language that is defamatory per se.

motion for a demurrer or summary judgment [citation]. In resisting such a motion, the plaintiff need not produce evidence that he or she can recover on every possible point urged. It is enough that the plaintiff demonstrates that the suit is viable, so that the court should deny the special motion to strike and allow the case to go forward.' [Citation.]" (*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1062.) PWOA's claims should not have been stricken.

XIII. *Remand to a New Judge*

Appellants ask that the case be remanded to a new judge pursuant to section 170.1, subdivision (c), on the basis that the trial court evidenced bias against them in its rulings. We decline to do so.

"The power of the appellate court to disqualify a judge under Code of Civil Procedure section 170.1, subdivision (c), should be exercised sparingly, and only if the interests of justice require it. [Citation.] The interests of justice require it, for example, where a reasonable person might doubt whether the trial judge was impartial [citation], or where the court's rulings suggest the 'whimsical disregard' of a statutory scheme. [Citation.]" (*Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 303.) We observe nothing in the record to indicate that the trial judge was not impartial or that his rulings disregarded any statutory scheme.

XIV. *Costs and Attorney Fees*

Appellants challenge the trial court's award of costs and attorney fees to respondents. In light of our conclusion that the special motion to strike should not have been granted, we also reverse the judgment granting respondents $82,048 in legal fees. The judgment and order granting costs and attorney fees did not, however, distinguish between the work performed on Howe's behalf and that

performed on Edwards' behalf. On remand, therefore, the trial court is to reevaluate the award of costs and attorney fees.

We decline appellants' request for attorney fees pursuant to section 425.16, subdivision (c)(1), which awards a plaintiff costs and fees upon a finding that "a special motion to strike is frivolous or is solely intended to cause unnecessary delay." These conditions have not been met here.[24]

Accepting as true the evidence favorable to appellants, "at least for the showing of 'minimal merit' required to defeat a SLAPP motion" (*Fashion 21, supra*, 117 Cal.App.4th at p. 1149, fn. omitted), they have proffered sufficient evidence to make a prima facie showing of probable success on the merits of their defamation claims as to Edwards.[25]

---

[24] Appellants rely on *Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 999-1000, which commented that the anti-SLAPP procedure is abused where the defendant knows the plaintiff could meet the burden under step two or where an earlier anti-SLAPP motion had been denied. Neither of those situations is found here.

[25] We reject respondents' arguments that appellants failed to show evidence of publication because of lack of authentication, and that appellants failed to show numerous statements were about them. As discussed above, authentication issues can be resolved at trial. The second argument borders on frivolous. The context of all of the statements makes it clear that the statements were about the Board and the individual Board members.

DISPOSITION

The order granting the special motion to strike as to Edwards is reversed. The order granting respondents costs and attorney fees is reversed and remanded for the trial court to determine the portion of costs and fees attributable to work performed on behalf of Howe. Each party is to bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.